Supreme Court, U.S.
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No. 05-172

IN THE

SUPREME COURT OF THE UNITED STATES

DONALD M. BOUTON, PETITIONER,

vs.

ALEXANDER FARRELLY in his capacity as Governor of the Virgin Islands; V.I. DEPARTMENT OF JUSTICE(Formerly Department of Law); and GOVERNMENT OF THE VIRGIN ISLANDS, RESPONDENTS.

On Petition For Writ of Certiorari to

United States Court of Appeals for the Third Circuit

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520/323-9821
505/388-8989

QUESTIONS PRESENTED

If the Governor of the Virgin Islands appoints a person to a position in the Virgin Islands Government, and said person accepts the appointment in a document which sets forth conditions of his acceptance, and said document is later ruled by the Territorial Court to be a nullity, can said person be ruled to have accepted the appointment unconditionally?

If, despite the Territorial Court's ruling, the Government dismisses the intended appointee from all employment in the Virgin Islands Government, can it be held that the intended appointee was deprived of a property right to employment to which he was entitled under the terms of the Government's collective bargaining agreement, without due process of law in violation of Article XIV, Section 1 of the U.S. Constitution?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

JURISDICTION

For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was 15 December 2004.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 2 February 2005 and a copy of the order denying rehearing appears at Appendix A.

An extension of time to file the petition for a writ of certiorari was granted to and including August 5, 2005 on 1 May and 2 June 2005.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Article XIV, Section 1 ..... Page 7

STATEMENT OF THE CASE

Bouton's employment in the Department of Law (now Justice) began in November 1972 and continued until March 20, 1987 when he was dismissed for refusing to comply with a dress code imposed by a newly appointed acting Attorney General. Bouton served in various positions at different times in the Department but primarily as an assistant attorney general (AAG).

On February 28, 1983 the Government of the Virgin Islands (Government) and the United Industrial Workers, Service, Transportation, Professional Government of North America of the Seafarers' International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District AFL-CIO (Union) entered into a collective bargaining agreement (CBA) (Pps. 29-36), covering all assistant attorneys general (AAG). The CBA continued in effect through March 20, 1987, and beyond.

Bouton, at that time, was an AAG and, consequently, he automatically became a member of the collective bargaining unit (CBU).

Federal grant funds in support of the Virgin Islands State Plan for child support became available in August 1986 for the AHO salary and the Government was in a panic to get the AHO position created and filled.

On September 17, 1986, Bouton received a notice of personnel action (NOPA) proposing to appoint him to the position of administrative hearing officer (AHO) effective August 5, 1986.

The text of Bouton's agreement (the Mercer Agreement) with Attorney General Leroy A. Mercer, which Bouton drafted and signed on September 17, 1986 and which Mercer approved and signed the next day follows:

September 17, 1986

Dear General Mercer:

I received today a Notice of Personnel Action appointing me to the position of Administrative Hearing Officer, effective August 5, 1986.

I agreed to accept this appointment on the condition that I be granted a leave of absence from my position of Assistant Attorney General. It is my understanding that you have agreed to this condition to the extent that I would resume employment as an Assistant Attorney General in the first vacancy occurring after the termination, by resignation or otherwise, of my service as Administrative Hearing Officer.

If I have misstated the terms of our agreement, please advise.

Respectfully,
Donald M. Bouton

The Attorney General noted his approval on the face of the memorandum which he dated, signed and returned to Bouton. (P. 38)

Bouton immediately assumed the AHO position in the expectation that the Government would honor the Mercer Agreement.

On January 7, 1987, Acting Attorney General Godfrey R. de Castro issued a directive requiring all professional male employees in the Department of Law to wear jackets and ties while on duty.

Temperatures in the Department of Law offices at the time the dress code was imposed, commonly reached 88 degrees. Hundred degree temperatures were not unusual and humidity was high.

Bouton perspires profusely in 80-degree temperatures in the Virgin Islands, and he had been treated unsuccessfully by a physician for a rash caused by an allergic reaction to deodorants and anti-perspirants.

Bouton refused to comply and was dismissed from the AHO position on March 20, 1987. (P.39)

Upon receipt of the Governor's dismissal letter, Bouton sent a memorandum (P.40)to the Acting Attorney General, pointing out that the Governor had neglected to enclose with his letter a NOPA appointing Bouton to one of the AAG positions then vacant.

The Government failed to provide Bouton with a statement of charges and a hearing, as required by the CBA, before dismissing him.

On April 6, 1987, the Union, in accordance with Section 5 of Article X of the CBA demanded that the Government arbitrate the termination of Bouton from the position of Assistant Attorney General.

Shortly after his dismissal, Bouton applied for a vacant hearing officer position in the Department of Labor, advising them of his dismissal. The Department of Labor did not respond.

The Government contended that because of his AHO appointment, Bouton was not a member of the Collective Bargaining Unit (CBU) and on March 26, 1987, the Government refused to arbitrate the Union's grievance.

On March 24, 1987 Bouton filed an action in the Territorial Court against the Government and the Union to enjoin the Government from filling the AHO position before arbitration; and to enjoin the Government from removing him from the payroll before arbitration. The Territorial Court denied injunctive relief and Bouton amended his complaint to seek specific performance of the CBA.

On April 8, 1988, the Territorial Court ordered the Government and the Union to arbitrate the status of the AHO position. The Arbitrator found that the AHO position was not in the AAG CBU and therefore he need not concern himself with provisions of the CBA or whether Bouton was on a leave of absence from his AAG position. He also found that Bouton's dismissal from the AHO position was neither arbitrary nor capricious. The award was upheld by the District Court and the United States Court of Appeals in Bouton 1, 987 F.2d 162 (3d Cir. 1993).

Bouton filed a complaint against the Government for breach of contract in the Territorial Court on February 19, 1993. In 1999 the Government and Bouton filed motions for summary judgment and

participated in a fruitless court-ordered medication.

On June 11, 2002 the Government's Plan A succeeded in having the Mercer agreement declared a "nullity" by the Territorial Court. The Government probably was concerned that the nullity ruling might also nullify Bouton's conditional acceptance of the AHO position, which was an integral part of the agreement. Bouton appealed to the Appellate Division of the District Court on June 26, 2002.

Plan B was launched to plug the gap in the nullity approach. Plan B's goal was to convince the courts that Bouton accepted the AHO appointment before the Mercer agreement was executed. Bouton assumes that there is a general Agreement that an appointment is ineffective in the absence of some evidence of acceptance by the appointee.

The Government adopted August 5, 1985 as the effective date of the NOPA which purported to appoint Bouton to the AHO position and contends that because Bouton was already in the AHO position, he had no standing to execute a new conditional acceptance on September 17, 1986 in the Mercer Agreement.

The Appellate Division's memorandum, while not explicit, seems to adopt the date of the Mercer Agreement as the date upon which Bouton accepted the AHO position. The Appellate Division's Memorandum brushed the conditions of acceptance aside.

Bouton appealed to the U.S. Court of Appeals for the Third Circuit on June 26, 2002. The Court of Appeals' opinion is explicit regarding the date upon which Bouton accepted the AHO appointment. It is September 17, 1986, the date of Bouton's memorandum to the Attorney General agreeing to accept the AHO position conditionally (the Mercer Agreement).

While there is no evidence that Bouton accepted the appointment, there is solid evidence that he was not interested in the appointment. Bouton rebuffed two proposals by Attorney General Mercer and the second decline brought a testy March 7th memorandum (P. 37) which

stated in part:

"In response to your request via memorandum of March 6, 1986, you shall not be appointed to the position of Administrative Hearing Officer . . . "

The third piece of evidence is Bouton's conditional acceptance, which was vitiated by the Territorial Court's nullity ruling..

REASONS FOR GRANTING THE PETITION

The U.S. Court of Appeals for the Third Circuit "has so far departed from the accepted and usual course of judicial proceeding and sanctioned such a departure" by the District Court of the Virgin Islands as to call for an exercise of the "Supreme Court's supervisory power."

The appeal in this case was scheduled for hearing on the briefs on December 13, 2004 on the island of St. Thomas in the U.S. Virgin Islands. The panel was also scheduled for hearings there on the 14th and 15th. The hearing on the 13th could not have had much impact on the opinion which was filed with the Clerk of the Court in Philadelphia two days later on the 15th of December 2004.The tone and substance of the opinion are less than judicial.

One is inclined to believe that the Court of Appeals' Opinion and Judgment were drafted by an unsupervised law clerk who did not make the trip to the Virgin Islands and who filed the documents with the Clerk of the Court inadvertently before the Panel judges had an opportunity to review them.

Bouton 1 is a red herring. It comprises a major part of the Court of Appeals' opinion. The opinion suggests that Bouton 1 is res judicata vis a vis the instant case but apparently does not wish to express the words. The Court clearly wanted to give the impression that Bouton had already had his bite at the apple.

The Court of Appeals quotes Judge Cowen in Bouton 1 at 987 F.2d 972 as a ruling that Bouton was not covered by the CBA.

Bouton concedes the accuracy of the quotation but not its meaning. Bouton's status was not in issue because the Territorial Court did not give the arbitrator authority to determine Bouton's status. Accordingly, the true meaning of Judge Cowen's words is that the CBA did not cover the AHO position and that is the reason the appellees have not pleaded res judicata. Bouton 1 citations are also dicta. Bouton 1 has no relevance to the instant case.

The Court of Appeals seemed to be in a quandary regarding the handling of the conditions set forth in the Mercer Agreement.

The Court of Appeals acknowledged Bouton's authorship of the Mercer Agreement at least six times in its opinion. So it came as a surprise when the opinion presented a breath-taking demonstration of slight of hand (P. 14), transferred the authorship of Bouton's September 17, 1986 memorandum from Bouton to Mercer and Mercer's ultra/vires, thus disposing of the conditions which Bouton had imposed on his acceptance of the AHO appointment.

Equally dazzling was the Court of Appeals' demonstration that while the conditions precedent did not survive the Territorial Court's nullification of the Mercer Agreement and Mercer's ultra vires, Bouton's acceptance of the AHO appointment on the other hand somehow survived.

A few paragraphs in the Court of Appeals' opinion will explain better than Bouton can, why we are still in court.

Even where there is a strong public interest in disregarding an illegal condition in a contract, courts will not uphold such a contract where the condition is an essential part of the agreed exchange. Restatement (Second) Contracts (1981) Secs. 178, 185, 225.

It follows from its ruling that the Court committed an error of law in failing to rule that Bouton remained an AAG and that he was damaged by the Government's breach of contract by failing to comply with the provisions of Article X and XIX of the CBA (Pps. 29-36).